SUCASA PRODUCE v. A.P.S. MARKETING, INC.
PACA Docket No. R-99-0172.
Decision and Order filed February 9, 2000.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $14,772.00 in connection with three transactions in interstate commerce involving perishable produce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant.

The amount claimed in the formal complaint does not exceed $30,000.00, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's Report of Investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and Respondent did not file an answering statement. Neither party filed a brief.

Findings of Fact

1. Complainant, Sucasa Produce, is a partnership composed of Sucasa Prod., Inc., Micasa Prod., Inc., and Pardis Prod., Inc. Complainant's address is P.O. Box 1381, Nogales, Arizona.

2. Respondent, A.P.S. Marketing, Inc., is a corporation whose address is 1525 S. Mooney Blvd., Suite D, Visalia, California. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about May 31, 1997, Complainant sold to Respondent, and shipped to Hanline in Shelby, Ohio, one truck load consisting of 1,110 cartons of cantaloupes, size 12's, on an f.o.b. basis. Respondent sold the melons to R. S. Hanline, and Hanline sold 816 cartons of the melons to Degaro.

4. The cantaloupes arrived at the place of business of Hanline, in Shelby, Ohio, and on June 4, 1997, at 3:25 P.M. a portion of the melons were federally inspected. That inspection disclosed the following information, in relevant part:

LOT: A
TEMPERATURES:4? To 41°F
PRODUCT: Cantaloupes
BRAND/MARKINGS:"Sucassa Produce" (12 Count)
ORIGINS: MX
LOT ID.:
NUMBER OF CONTAINERS: 821
INSP. COUNT: Y
LOT: B
TEMPERATURES:4? To 42°F
PRODUCT: Cantaloupes
BRAND/MARKINGS:"No Brand" Net Wt 36 LBS, (12 Count)
ORIGINS: MX
LOT ID.:
NUMBER OF CONTAINERS: 56
INSP. COUNT: Y

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	12 %	03 %	00 %	Sunken Dark Areas (0 to 33%)	Each lot: Mostly ripe and
	04 %	00 %	00 %	Bruising	firm, Some firm. Ground
	04 %	04 %	00 %	Decay (0 to 17%) Generally early stages	color mostly yellow, many turning yellow.
	20 %	04 %	00 %	Checksum	

B	13 %	02 %	00 %	Sunken Dark Areas (8 to 17)
	02 %	02 %	00 %	Decay
	15 %	04 %	00 %	Checksum

GRADE:

Complainant and Respondent agreed to the cantaloupes being sold on a price after sale basis.

5. On or about June 2, 1997, Complainant sold to Respondent, and shipped to M. Degaro Company, Inc., (hereafter sometimes Degaro) in Cincinnati, Ohio, one truck load consisting of 1,488 cartons of honeydew melons, size 6's, on an f.o.b basis. Respondent sold the melons to R. S. Hanline & Company, Inc., (hereafter sometimes Hanline) in Shelby, Ohio, and Hanline sold the melons to Degaro.

6. The honeydew melons arrived at the place of business of Degaro in Cincinnati, Ohio, and on June 5, 1997, they were federally inspected. The inspection showed temperatures of 50 to 57 degrees Fahrenheit, and 28 percent damage by surface scars, 8 percent damage by sunken discolored areas, and no decay. Complainant and Respondent then agreed to the melons being handled on a price after sale basis.

7. On or about May 31, 1997, Complainant sold to Respondent, and shipped to Hanline in Shelby, Ohio, one truck load consisting of 1,936 cartons of Flame seedless grapes. The grapes were sold on an f.o.b. basis, and priced at $10.50 per carton, plus $23.50 for a temperature recorder, and $3,800.00 for freight, or $24,151.50 for the load. Respondent accepted the grapes without objection, and has paid Complainant all but $1,366.00 of the purchase price.

8. Informal complaints were filed on August 27, and September 23, 1997, which dates were within nine months after the causes of action relative thereto accrued.

Conclusions

The inspection of the cantaloupes referred to in Findings of Fact 3 and 4 was not an inspection of the whole load. For some reason 233 cartons of the cantaloupes were not inspected. These melons must be averaged in with the melons inspected to determine whether there was a breach. The bill of lading lists all the melons as "Sucassa" label, and we will assume that the 56 cartons that were not so labeled were an anomaly, and that the 233 cartons that were not included in the inspection had the "Sucassa" label. If we assume that the 233 cartons contained no defects and average them in with the 821 cartons, we arrive at an average of 15.58 percent defects for the lot. Since the distance between the shipping point in Arizona and the Shelby, Ohio, destination is approximately 2,000 miles, the transit period should

have been slightly less than 3 days. The percentage of condition defects that we would allow in order to make good delivery under the suitable shipping condition rule is 13 percent, and if we use the four day period between shipment and time of inspection, we would allow 14 percent. Accordingly, although these cantaloupes were close to making good delivery, they did not made good delivery. This was the premise upon which the parties modified the contract to call for price after sale terms.

Neither the UCC nor the Act recognizes the term "Price After Sale". The term has been held to be a subcategory of "Open Price."[1] The Uniform Commercial Code, section 2-305(1), states:

> Open Price Term:
>
> (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
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> (a) nothing is said as to price; or
>
> (b) the price is left to be agreed by the parties and they fail to agree; or
>
> (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

Thus "price after sale" or "Open Price" assumes that the parties will negotiate a price after the goods are sold. If they do not, the reasonable value of the goods should be imputed.[2] We have stated that although the Regulations do not place a duty to account upon a buyer who purchases on an open basis, should the parties fail to reach an agreement as to price the receiver fails to account accurately and in detail at its own risk.[3] In this case Respondent did not render a detailed accounting of the resale of the cantaloupes. Accordingly we will look to applicable market reports as a guide to determining a reasonable price. The closest market to Shelby, Ohio, is Pittsburgh, Pennsylvania. Size 12 cantaloupes from Mexico were selling on that market on June 5, 1997, for $10.00 to $12.50. Since the subject cantaloupes contained a little more condition defects than is concordant with good delivery we will use the lower figure of the price range, or $10.00, rather than the average price. Applying this figure the market value of the load was $11,100.00. From this

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[1] *Well Pict, Inc. v. Ag-West Growers, Inc.*, 39 Agric. Dec. 1221, 1227-1228 (1980).

[2] *PACA Docket No. 4456*, 5 Agric. Dec. 494 (1946). See also *J. Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 565 (1979).

[3] *Ronnie Carmack v. Delbert E. Selvidge*, 51 Agric. Dec. 892 (1992).

amount should be deducted a 20 percent profit, or $2,220.00.[4] Since Complainant billed Respondent $3,600.00 for freight we assume that freight was paid by Complainant, and should not be deducted in the computation of reasonable value. We conclude that the reasonable value of the load of cantaloupes was $8,880.00. Complainant has restricted its claim as to these melons to $6,660.00, and we conclude that this is the amount owing from Respondent to Complainant as to the cantaloupes.

The inspection of the honeydew melons covered by Findings of Fact 5 and 6 does not show a breach of the warranty of suitable shipping condition, since quality defects are not considered where melons are sold without reference to grade. However, no doubt on the basis of the high quality defects, the parties agreed after the inspection to the melons being sold on a price after sale basis. Although the receiver issued an accounting which showed a breakdown of the sales, the accounting did not show on what date the sales were made. Complainant has objected to this omission, and we agree that the accounting cannot be used.[5] Accordingly we must resort to market reports to ascertain the reasonable value of the honeydew melons. The receiving point for these melons was Cincinnati, Ohio, which is equidistant from Pittsburgh and Chicago. Only Chicago shows quotes for Mexican size 6 honeydews, and the price shown is $11.00 to $12.00. Since the subject melons had extensive scarring we will use the lower of these quotes, or $11.00, as the market value of these melons. The load of 1,488 cartons, therefore, had a value of $16,368.00. From this should be deducted a profit of 20 percent, or $3,273.60, and freight in the amount of $3,400.00. We conclude that the reasonable value of the melons was $9,694.40. Complainant has restricted its claim as to these melons to $6,696.00, and we conclude that this is the amount owing from Respondent to Complainant.

The deduction that Respondent made from the purchase price of the grapes was made on the basis that a deficit was incurred as to the cantaloupes and honeydews. Since we have found no deficit due, Respondent owes the remainder of the purchase price of the grapes, or $1,366.00. The total we have found due and owing from Respondent to Complainant for the three loads is $14,772.00. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in

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[4] *C.J. Prettyman, Jr., Inc. v. American Growers, Inc.*, 55 Agric. Dec. 1352 (1996).

[5] See *Sunkist Growers v. Fishman Produce*, 41 Agric. Dec. 137 (1982); and *Mutual Vegetable Sales v. Joseph Notarianni & Company*, 29 Agric. Dec. 1049 (1970).

consequence of such violations." Such damages include interest.[6] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[7] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $14,772.00, with interest thereon at the rate of 10% per annum from July 1, 1997, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

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[6] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[7] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).